No. 91-734

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NORTHWEST AIRLINES, INC.,

Cross-Petitioner,

vs.

WILLIAM D. WEST,

Cross-Respondent.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CROSS-PETITION FOR A WRIT OF CERTIORARI

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October 31, 1991

QUESTIONS PRESENTED FOR REVIEW

Where the court of appeals found that passenger boarding and denied boarding services of an airline are air carrier "services" within the meaning of the preemption provision of the statute, did it err when it held that there can be no preemption of state laws of general application which merely have an "effect" on airline services, but only of state laws which are "addressed exclusively to airline services"?

Did Congress require that laws relating to the rates, routes, or services of an air carrier be defined not by the balkanizing forces of state and local regulation, but rather by a uniform nationwide system of federal law?

PARTIES TO THE PROCEEDING

All parties to the proceeding appear in the caption. American Airlines and Trans World Airlines sought leave to file briefs as *amici curiae* in the court of appeals in support of Northwest Airlines, Inc.'s Petition for Rehearing and Suggestion for Rehearing *en banc*. Permission to file *amici curiae* briefs was denied.

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CROSS-PETITION FOR A WRIT OF CERTIORARI

Cross-petitioner, Northwest Airlines, Inc. ("Northwest")[1] requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, filed on September 11, 1990, amended February 5, 1991, which affirmed in part, and reversed and remanded in part, the judgment of the United States District Court for the District of Montana.

[1] Pursuant to Rule 29.1 of this Court, cross-petitioner states that Northwest does not have corporate parents or subsidiaries, the shares of which are publicly traded.

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS BELOW

The unpublished opinion and order of the United States District Court for the District of Montana appears in the Appendix to West's Petition in Docket 91-505 ("Pet. App.") at 25a-31a. The first opinion of the United States Court of Appeals for the Ninth Circuit, which was withheld from publication pending a ruling on Northwest's petition for rehearing, appears at Pet. App. 12a-20a. The second opinion, which amended the first and is the subject of this cross-petition, appears at Pet. App. 1a-11a and is reported at 923 F.2d 657 (1991). An order denying rehearing of the amended opinion appears at Pet. App. 21a, and the judgment of the court of appeals appears at Pet. App. 22a.

JURISDICTION

The judgment of the court of appeals was initially entered on September 11, 1990, and amended on February 5, 1991. Cross-Respondent timely filed a petition for rehearing which was denied on June 4, 1991. By order dated August 21, 1991, this Court extended Cross-Respondent's time to file a petition for writ of certiorari to October 3, 1991. That petition was received on October 1, 1991. Cross-Petitioner relies on Rule 12.3 of the Rules of this Court. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PERTINENT STATUTES AND REGULATIONS

The Airline Deregulation Act of 1978, Pub.L. No. 95-504, 92 Stat. 1705 (1978), which added Section 105 to the Federal Aviation Act, as amended, now codified as 49 U.S.C. App. § 1305, and entitled Federal Preemption states:

(a) Preemption

(1) [N]o State or political subdivision thereof and no interstate agency or other political

> agency of two or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority under subchapter IV of this chapter to provide air transportation.

The Civil Aeronautics Act of 1938, Ch. 601, 52 Stat. 973 (1938) contained a savings clause in § 1106, now codified as 49 U.S.C. App. § 1506, which states:

> Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

Section 250.9 of Title 14 of the Code of Federal Regulations (1991) entitled Written Explanation of Denied Boarding Compensation and Boarding Practices states, in relevant part:

> (a) Every carrier shall furnish passengers who are denied boarding involuntarily for flights on which they hold confirmed reserved space immediately after the denied boarding occurs, a written statement . . . .
>
> (b) The statement shall read as follows:
>
> * * * *
>
> **Passenger's Options**
>
> Acceptance of the compensation may relieve (name of air carrier) from any further liability to the passenger caused by its failure to honor the confirmed reservation. However, the passenger may decline the payment and seek to recover damages in a court of law or in some other manner.

STATEMENT OF THE CASE

On September 3, 1986, respondent William D. West ("West") purchased an airline ticket on Northwest Flight 1150 from Great Falls, Montana to Arlington, Virginia. On October 1, 1986, because of the generally lower passenger demand, Northwest made an economic decision to service Flight 1150, which left from Great Falls daily, with a DC-9 instead of a larger Boeing 727. A 727 carries 68 more passengers than a DC-9.

On October 7, 1986, when West arrived at the gate, the flight was overbooked by five persons. Northwest found three volunteers who agreed to give up their seats in return for compensation from Northwest. West and another passenger were involuntarily denied boarding and were offered denied boarding compensation equal to 200% of the value of their tickets. One person accepted the compensation, but West rejected the offer.

Northwest offered West an alternative flight which was scheduled to arrive at Dulles Airport, near his intended destination, six hours later than his originally scheduled flight. He declined this alternative flight because of the inconvenience and chose to make the trip about two weeks later.

West sued under § 404(b) of the Federal Aviation Act of 1958. He does not challenge the district court's dismissal of that claim based on the prior repeal of that section. He also claimed $10,000 in compensatory damages and $50,000 in punitive damages alleging that Northwest breached the covenant of good faith and fair dealing pursuant to Montana law. His suit was removed from state to federal court based upon diversity of citizenship pursuant to 28 U.S.C. §§1332 and 1441. The district court granted Northwest's motion for summary judgment holding that West's state law claim was preempted by 49 U.S.C. §1305, and West appealed.

The ninth circuit agreed that boarding procedures constituted "services" pursuant to the statute stating:

> In this case, we believe that the plain meaning of "services" clearly includes services provided to customers such as the boarding services at issue here.
>
> * * *
>
> [W]e find that Northwest's passenger services, including boarding, are airline services within the meaning of section 1305. (Pet. App. at 7a; 923 F.2d at 660).

The court of appeals, however, construed the word "relating" to encompass only laws which were "addressed *exclusively* to airline service" (Pet. App. at 8a; 923 F.2d at 660, emphasis added). Laws of general application which "merely have an *effect* on airline services are not preempted" (*id.*, emphasis in original).

The court of appeals found no implied preemption because, since 1938, section 1506 has preserved all state law. The mere existence of section 1506, indicated the court, demonstrated "that Congress did not impliedly preempt West's state law claims under the FAA" (Pet. App. 9a-10a; 923 F.2d at 661).

Concerning conflict preemption, the court below reviewed 14 C.F.R. § 250.9(b). That provision, set forth in Pet. App. 34a-36a, grants the passenger an option to accept denied boarding compensation or reject it and "seek to recover damages in a court of law." Without citation, the court determined that the federal regulation referred to recovery under "state common law remedies," as opposed to a uniform federal law which would be enforced in both state and federal courts alike (Pet. App. 10a; 923 F.2d at 661).

Northwest filed a petition for rehearing with a suggestion for rehearing en banc. The petition was granted and the court amended its opinion. It maintained its holding that state law causes of action for compensatory damages were not preempted. It held, however, that West's claim for punitive damages was preempted (Pet. App. 10a; 923 F.2d at 661).

West's petition for rehearing of the amended opinion was denied. On October 1, 1991, West's Petition for Writ of Certiorari, Docket No. 91-505, was received and this Cross-Petition followed.

REASONS FOR GRANTING THE CROSS-PETITION

I

The Decision Below Constitutes a Clear Departure From Existing Law and Directly Conflicts With the Law of Three Other Circuits.

The Fifth Circuit has specifically held that "Section 1305, which is entitled 'Federal Preemption' expressly preempts state law. . ." in a case of a loud and boisterous passenger who was denied a seat. *O'Carroll v. American Airlines, Inc.*, 863 F.2d 11, 13 (5th Cir.) *cert denied*, 490 U.S. 1106 (1989). Moreover, in *Trans World Airlines, Inc. v. Mattox*, 897 F.2d 773 (5th Cir.), *cert. denied*, ____U.S.____, 111 S.Ct. 308 (1990), *subsequent decision*, 924 F.2d 1055 (5th Cir. 1991) (Mem.), *petition for cert. filed sub nom. Morales v. Trans World Airlines, Inc.*, No. 90-1604, the Fifth Circuit "concluded that § 1305(a)(1) expressly preempts state deceptive advertising laws as applied to airline fare advertising" (*id.* at 783). Section "1506 does not preserve state law remedies when there is express preemption under § 1305" (*id.*). Concerning the petition for certiorari in *Morales*, *supra*, on June 10, 1991 the Solicitor General was invited

to express the views of the United States, ____U.S.____, 111 S. Ct. 2794 (1991).

The decision below is also in conflict with the law in the Seventh Circuit. In *Illinois Corp. Travel v. American Airlines, Inc.*, 889 F.2d 751 (7th Cir. 1989), *cert. denied*, ____U.S.____, 110 S. Ct. 1948 (1990), a travel agency, which was prohibited from advertising that it discounted the airline's tickets, alleged violations of the state's Consumer Fraud and Deceptive Business Practices Act, as well as state common law rules such as the prohibition against tortious interference with respective contractual advantage. Holding that state law was expressly preempted, the court held: "If state law relates to 'rates, routes, or services,' the absence of contrary federal law is irrelevant" (*id.* at 754).

Furthermore, the District of Columbia Circuit in *Anderson v. USAir, Inc.*, 818 F.2d 49, 57 (D.C. Cir. 1987), held that where a blind attorney was denied a seat in an emergency exit row, state law obligations to give courteous service were "expressly preempted" by § 1305.

The holding of the Ninth Circuit is clearly in conflict with these decisions.

II

Congress Expressly Preempted Airline Rates, Routes and Services From the Balkanization of Conflicting State Laws.

From the passage of the Civil Aeronautics Act of 1938 through the present, Congress has realized and required that the nation's airline industry be regulated in a uniform and coherent manner. From its inception, the Civil Aeronautics Board took a leading role, and the courts deferred in accordance with the doctrines of primary jurisdiction and exhaustion of remedies. With the enactment of the Airline Deregulation Act in 1978, Congress emphasized

the importance of "competitive market forces, to determine the quality, variety, and price of air services." Pub. L. No. 95-504, 92 Stat. 1705 (1978) discussed in *Trans World Airlines Inc. v. Mattox*, 897 F.2d 773, 777 (5th Cir.), *cert denied*, ____U.S.____, 111 S. Ct. 307 (1990), *subsequent decision*, 924 F.2d 1055 (5th Cir. 1991) (mem.), *petition for cert. filed sub nom. Morales v. Trans World Airlines, Inc.*, No. 90-1604. As the guiding hand of the Civil Aeronautics Board was shifted to the invisible hand of market forces, Congress expressly added a specific preemption provision, §1305. The House Committee on Public Works and Transportation noted that a "specific provision on the jurisdiction of the States and the Federal Government over airlines" was needed to prevent "uncertainties and conflicts. . . ." H. R. Rep. No. 1211, 95th Cong., 2d Sess. 15-16 (1978), *Reprinted in* 1978 U.S. Code Cong. & Admin. News 3737, 3751-52, as cited in *Mattox*, 897 F.2d at 777. The Committee intended §1305 to "prevent conflicts and inconsistent regulations" insuring that "no state may regulate that carrier's routes, rates or services." H.R. Rep. No. 1211 at 16.; 1978 U.S. Code Cong. & Admin. News at 3752, as cited in *Mattox*, *supra*, 897 F.2d at 777. As concluded by the First Circuit, "Congress obviously did not intend to leave a vacuum to be filled by the Balkanizing forces of state and local regulation." *New England Legal Found. v. Massachusetts Port Auth.*, 883 F.2d 157, 173 (1st Cir. 1989).

Nader v. Allegheny Airlines, 426 U.S. 290 (1976), another denied boarding case, was decided two years before §1305 was enacted. It did not deal, therefore, with that section's express preemption of state law. *See also, In Re Air Disaster at Lockerbie, Scotland on December 21, 1988*, 928 F.2d 1267 (2d Cir.), *cert. denied sub nom. Rein v. Pan American World Airways, Inc.*, 60 USLW 3293 (1991), where, in a case involving recoverable damages in international air transportation governed by the Warsaw Convention, the court held that state law was preempted (*id.* at 1273). The

Second Circuit determined that courts should look to federal law and apply the "most appropriate [federal] analog" (*id.* at 1279) in order to assure uniform interpretation throughout the United States (*id.* at 1278).

Northwest does not seek to deny West his day in court. He may certainly sue in state or federal forums pursuant to 14 C.F.R. 250.9(b). When he does, however, pursuant to § 1305 all state law is preempted.

CONCLUSION

We ask the Court to grant a writ of certiorari.

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